UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:03-CR-77-T-30TBM**

HATEM NAJI FARIZ
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MOTION IN LIMINE OF HATEM NAJI FARIZ TO PRECLUDE THE INTRODUCTION OF THE ATTACKS, OR ALTERNATIVELY TO REQUIRE ORDER OF PROOF TO REDUCE UNNECESSARY PREJUDICE REGARDING ALLEGED ATTACKS, AND TO PRECLUDE THE INTRODUCTION OF IRRELEVANT, PREJUDICIAL, AND HEARSAY EVIDENCE, REQUEST FOR A PRETRIAL HEARING, AND MEMORANDUM OF LAW IN SUPPORT

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fifth and Sixth Amendments to the U.S. Constitution and Federal Rules of Evidence 401, 402, 403, 702, 801, 802, and 803, respectfully requests that this Honorable Court (1) preclude the introduction of any evidence, and remarks in opening statements, concerning alleged attacks by co-conspirators allegedly associated with the Palestinian Islamic Jihad ("PIJ"), and (2) if such evidence is to be admitted at all against Mr. Fariz, preclude the admission of, and remarks in opening statements concerning, irrelevant, prejudicial, and hearsay evidence. Because of the importance of these issues, Mr. Fariz requests a pretrial hearing. Local Rule 3.01(d). As grounds in support, Mr. Fariz states:

I. Introduction

A. The Nature of the Attacks Allegations in the Instant Case

The Superseding Indictment alleges a number of acts of violence purportedly committed by individuals associated with the Palestinian Islamic Jihad ("PIJ").[1] Mr. Fariz is not alleged to have been involved in any attacks alleged in the indictment, in planning any of the attacks, or to have had prior knowledge of any of the attacks. *See* Doc. 636, Superseding Indictment; *see also* Doc. 89, Tr. 3/25/03 (Bond Hearing), at 127 (statement of AUSA Walter Furr) ("I said it before, I'll say it again, there's no allegation that any of these defendants personally participated in the commission of violent crimes."). As the government more recently commented, these attacks occurred thousands of miles from where the Defendants reside in the United States. *See, e.g.,* Doc. 977 at 5. The attacks alleged in the indictment are instead alleged to have been committed by conspirators "associated with" the PIJ.

As a further illustration of the relation of the attacks to this case, the government has asked this Court to preclude affirmative defenses of justification, and evidence in support thereof, in part because of the distance between the Defendants located in the United States and the attacks that occurred in Israel and the Occupied Territories. (Doc. 977 at 5). The government's theory literally distances the Defendants from the alleged attacks in this case.

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[1] Specifically, the Superseding Indictment contains allegations that "co-conspirators associated with the PIJ" committed the acts that occurred in Overt Acts 2, 3, 14, 17, 61, 88, 124, 131, 137, 184, 234, 248, 279, 284, 290, 315, and 321.

Further, the charges in this case do not require as an element any murders or attempted murders. As such, evidence of the attacks is immaterial, since it is not necessary to any of the charges in the instant case. Consequently, the only potential purpose for the introduction of evidence demonstrating the aftermath of a suicide bombing or other attack would be to inflame the jury and mislead them as to the nature of the case.

B. Guilt is Personal

Should the Court determine that the attacks are generally admissible, Mr. Fariz asks for a trial plan that ensures that the jury will consider his own conduct, and not be mislead by the conduct of others, in reaching a verdict. In this case, the government seeks to hold Mr. Fariz liable for the acts of others, based on allegations that he was involved in or supported the PIJ. Guilt, however, is personal. As the Supreme Court explained in *Scales v. United States*:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment.

367 U.S. 203, 224-25 (1961). Mr. Fariz's culpability, if any, must be established based on his own conduct and actions – namely, knowingly and willfully conspiring as charged to murder other individuals – as distinguished from the actions of other co-conspirators. Mr. Fariz's guilt or innocence thus rests ultimately on whether or not *he* entered into and participated in the conspiracies to murder. *Cf. Kotteakos v. United States*, 328 U.S. 750, 773

(1946) (indicating that while joint trials are preferred in federal court, such "proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass"). Mr. Fariz cannot be convicted based solely on the words or conduct of others, including the other Defendants who will be standing trial before the Court.

These principles must form the backdrop of the review of the evidence in this case if Mr. Fariz, and his co-defendants, have any hope of a fair trial in this matter given the nature of the allegations against them. As has already become readily apparent through the review of the completed juror questionnaires, many of the potential jurors in this case already had a preconceived notion of guilt on the part of Dr. Sami Al-Arian, and many more expressed an inability to serve as a fair and impartial juror given the case's terrorism allegations.

With the right to due process and a fair trial in mind, Mr. Fariz alternatively requests that this Court require the government to establish the elements of the offense that would give rise to criminal liability on the part of Mr. Fariz *prior* to presenting argument or evidence concerning the acts of others. Specifically, Mr. Fariz requests that the Court require the government to establish that Mr. Fariz knowingly and willfully joined a RICO murder conspiracy with the intent that others would commit murder (Count One) and knowingly and willfully conspired to murder individuals abroad (Count Two).[2] Should the government meet

[2] Mr. Fariz addresses the remaining counts against him in Part II.B, *infra*.

its burden with respect to these elements, Mr. Fariz lastly requests that this Court preclude the admission of irrelevant, prejudicial, and hearsay evidence concerning the alleged attacks.

II. Because of the Obvious Prejudice of any Evidence Concerning Alleged Attacks, Mr. Fariz Requests that, if the Attacks are Generally Admissible, this Court Require the Government to Present its Evidence Concerning Whether Mr. Fariz Should Be Criminally Liable for those Attacks Prior to Presenting Argument or Evidence Concerning any Attacks Themselves.

A. Legal Standards for this Request for a Trial Plan

This Court has the discretion to control the order in which evidence is presented. Fed. R. Evid. 611(a); *see also* Fed. R. Evid. 104(b) advisory committee notes ("The order of proof here, as generally, is subject to the control of the judge."). As Rule 611(a) provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Fed. R. Evid. 611(a). These goals have particular import in this case.

As to the first consideration – the ascertainment of truth – the complexity of the case is already well understood. The number and difficulty of the findings that the jury is going to have to make based on the government's allegations and the volume of evidence that the government may seek to introduce is considerable. The jury is going to have to sort through all of the facts and legal arguments to determine whether the government has met its burden of proof as to each element of each of the 53 counts in the indictment as they apply (if at all) to each of the Defendants.

Additionally, much of the evidence concerning the attacks, especially their more specific details, could cause the jury to be swayed by an emotional reaction to the evidence, interfering with their ability to decide the issues based on the facts presented to them. Fed. R. Evid. 403 (providing for exclusion of relevant evidence if its probative value is substantially outweighed by the "danger of unfair prejudice" and "confusion of the issues"); Fed. R. Evid. 403 advisory committee notes ("'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."). Specifically, the government has included within the discovery:

(1) approximately six experts who may testify concerning medical/forensic pathology findings and reports concerning the attacks in the Middle East. From these experts, the government has produced over 100 forensic pathology/autopsy reports, including numerous photographs that will certainly result in emotional decision-making and unfair prejudice to Mr. Fariz.[3]

(2) approximately nine experts who will likely testify concerning explosives and other such evidence of the attacks. From these experts, the government has produced approximately over 30 reports concerning explosives, chemical analysis, and other alleged methods of the attacks in the Middle East, as well

[3] The government has also produced a number of expert forensic pathology reports by individuals who have not been disclosed as experts.

as reports and images of bombings that the government simulated in the Florida Everglades in November 2004 using local Hartline buses.

(3) several crime scene videos and countless photographs of the alleged attacks. These images are extremely graphic in nature and will certainly result in emotional decision-making and unfair prejudice to Mr. Fariz.

(4) experts in the generation of crime scene models, who have produced reports and documents pertaining to models of the alleged crime scenes.

(5) law enforcement, intelligence, and other governmental reports and records concerning the alleged attacks, including statements of individuals who observed, experienced, or were accused of an attack.

In the absence of a trial plan that addresses the issues of prejudice and confusion, the ascertainment of the truth – whether Mr. Fariz is criminally liable – may be undermined by the prejudice of the potential evidence and complexity of the charges.

With respect to the second goal – avoiding the needless consumption of time – a trial plan requiring a logical presentation of the evidence may reduce the risk of wasting the jury's time on matters that need not ultimately be presented. Specifically, while the government may seek to introduce numerous attacks and many details concerning these attacks, such a presentation may be unnecessary, as explained in Part I.A., *supra*. Alternatively, presentation concerning the attacks may further be unnecessary if the government cannot establish that each of the Defendants before the Court in this trial joined the criminal conspiracies alleged in Counts One (RICO murder) and Two (conspiracy to murder persons abroad). In other

words, if the government cannot establish this aspect of the case, the attacks themselves will certainly be irrelevant and their probative value non-existent. *See* Fed. R. Evid. 401; Fed. R. Evid. 401 advisory committee notes (indicating that relevance is based on the "relation between an item of evidence and a matter properly provable in the case"); Fed. R. Evid. 403; Fed. R. Evid. 104(b). Accordingly, the government should be required to present each of the Defendants' knowing participation in the conspiracies and their intent to further the objectives of the conspiracies (the alleged attacks) prior to presenting evidence of the attacks themselves. Fed. R. Evid. 611(a); Fed. R. Evid. 611(a) advisory committee notes ("Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b)."); *see* Fed. R. Evid. 403 (providing for the exclusion of the evidence if its probative value is substantially outweighed by "waste of time").[4]

Courts have used this approach in cases involving mass torts where the issues concerning liability are complex and oftentimes involve emotionally-laden evidence. For example, in the well-known civil lawsuit *Anderson v. W.R. Grace & Co.*, No. 82-1672-S (D. Mass.), the federal district court judge required the trial to proceed in three phases, citing the "complexity of the issues and the evidence." Memorandum and Order on Defendant Beatrice

[4] Requiring the government to present its case in this manner would also facilitate the Court's determination of the "needless presentation of cumulative evidence." Fed. R. Evid. 403.

Food Co.'s Motion for Immediate Entry of Final Judgment Under Rule 54(b) at 1 (D. Mass. Sept. 17, 1986) (attached as Exhibit A).[5] As the Court wrote:

> Phase I would concern whether either defendant had acted negligently and whether any such negligence had contributed substantially to the contamination of Wells G and H. In Phase II the issue would be whether the contamination had caused certain plaintiffs to contract leukemia, and if so, what damages they had suffered. And Phase III would deal with whether the contamination had damages certain plaintiffs' immune systems, and if so, what damages they had suffered. From the beginning of the trial I made clear that Phase I was the foundation for the other phases of the trial; if the plaintiffs failed to establish their case in Phase I, the trial would end.

Id. at 1-2. By structuring the order of proof in this way, the court required the plaintiffs to establish first that the defendants in the case, W.R. Grace and Beatrice Foods, had acted in such a way that would make them potentially liable. The parallel approach in this case would be to require the government to establish first that Mr. Fariz and his three co-Defendants had each joined the conspiracies alleged in the superseding indictment and had the intent that others in the conspiracies would commit murder, such that the Defendants would be potentially liable for the attacks.

This Court has the discretion to require this order of proof to ensure a logical presentation of the issues. The former Fifth Circuit similarly endorsed an order of proof designed to deal with a case with conspiracy and substantive charges. As the Court described at length:

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[5] This lawsuit became the subject of the book *A Civil Action* by Jonathan Harr and the movie by the same name.

> When a defendant is charged with the commission of substantive offenses and also with conspiracy, problems are presented to both the prosecution and the defendant as to the order and sequence of proof. Ideally, it is always more orderly to present sufficient evidence to establish the prima facie existence of the conspiracy and to identify the conspirators before presenting detailed evidence as to the substantive offenses and the acts and declarations of the conspirators which were made during the period of the existence of the conspiracy in the achievement of its objects. Clearly, in such circumstances, acts and declarations of each of the conspirators in furtherance of the conspiracy are admissible against all of them. . . . As a practical matter, the proof is often 'sprawling' and at certain stages of the trial may appear to present a hodgepodge of acts and statements by various persons. In the final analysis, however, it is always necessary that the evidence be connected and enmeshed so as to present a logical sequence of evidence linking the defendant with the charges against him. The very nature of such cases requires that broad discretion be vested in the trial court with respect to the order of proof. . . .
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> In the instant case the record convinces us that the prosecution presented its evidence in a most orderly fashion. The prosecution first introduced evidence of the existence of the conspiracy in Oklahoma and then presented proof of the subsequent commission of overt acts in the Western District of Texas in accordance with well-laid plans.

Downing v. United States, 348 F.2d 594, 600 (5th Cir. 1965) (citations omitted).[6] Mr. Fariz requests a trial plan that similarly ensures that the issues are presented in a logical way that addresses potential juror confusion and unfair prejudice.[7]

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[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

[7] In addition to this grounds for such a trial plan, Mr. Fariz asserts that the delayed production of Israeli materials pertaining to the alleged attacks warrants a delay of the presentation of such evidence, since Mr. Fariz has been unable to review and prepare Mr. Fariz's defense adequately in the time given. This argument will be addressed more fully in a separate motion. Mr. Fariz would note that further review of the evidence could also possibly lead to offers to stipulate to some aspects of the evidence, should any attacks ultimately be admissible

B. The Elements that the Government Should Have to Prove Prior to Admitting Evidence Concerning the Alleged Attacks

1. Count One: RICO murder conspiracy

Count One of the Superseding Indictment alleges that Mr. Fariz and his co-defendants conspired to conduct and participate, directly and indirectly, in the conduct of the affairs to the "PIJ Enterprise," through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d). The racketeering activity charged includes, *inter alia*, murder in violation of Florida law and conspiracy to murder in violation of 18 U.S.C. § 956. In this Count, Mr. Fariz and his three co-Defendants are accused of conspiracies in which others would commit the alleged attacks. For the government to prove a RICO conspiracy as charged in Count One, the government will have to show, *inter alia*, that:

> First: That two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, namely, to engage in a "pattern of racketeering activity" as charged in the indictment; and
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> Second: That the Defendant knowingly and willfully became a member of such conspiracy; and
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> Third: That at the time the Defendant knowingly and wilfully agreed to join in such conspiracy, the Defendant did

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under this proposed trial plan, resulting in a shorter trial.

> so with the specific intent either to personally participate in the commission of two predicate offenses," as elsewhere defined in these instructions, *or that the Defendant specifically intended to otherwise participate in the affairs of the "enterprise" with the knowledge and intent that other members of the conspiracy would commit two or more "predicate offenses" as a part of a "pattern of racketeering activity."*

Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Offense Instruction 71.2 (2003) (emphasis added).

In this request for a trial plan, Mr. Fariz is asking that the government be required to prove: (1) the existence of the charged conspiracy, (2) Mr. Fariz's knowing and willful participation in the charged conspiracy, and (3) his intent for others to commit murder, prior to presenting any argument or evidence on the attacks themselves (if necessary). If the Defendants did not knowingly participate in the RICO conspiracy with the intent that others would commit the predicate acts of murder, then there would be no need to present any argument or evidence of the attacks themselves. Fed. R. Evid. 104(b), 401, and 403. Moreover, in light of the obvious prejudice of the attacks, this plan will assist the Court in making a determination under Rule 403 concerning the attacks' relative probative value as

compared with their unfair prejudice. Fed. R. Evid. 403. Mr. Fariz would therefore request this order of proof to ensure his right to a fair trial is protected.

2. Count Two: Conspiracy to Murder Persons Abroad

Count Two alleges that the Defendants conspired to murder, maim, or injure persons abroad, in violation of 18 U.S.C. § 956(a)(1). This provision was passed as part of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, on April 24, 1996. The Overt Acts alleged as part of Count Two are 236 through 324, with dates ranging from October 8, 1996 to January 25, 2003, reflecting the date of AEDPA's enactment. (Doc. 636 at 103).

Mr. Fariz makes a similar request as to Count Two. There is not a pattern instruction for 18 U.S.C. § 956, the subject of Count Two. Mr. Fariz contends that the government will have to prove, for the attacks after April 24, 1996, *inter alia* that:

> First: The Defendant agreed with at least one person to murder or maim a person at a place outside of the United States;
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> Second: The Defendant willfully joined the agreement with the intent to further the conspiracy's purposes;
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> Third: During the conspiracy, at least one of the conspirators committed at least one overt act within the United States in furtherance of the object of the conspiracy; and

Fourth: The Defendant was in the United States when the agreement was made.

18 U.S.C. § 956(a); Doc. 479 at 46-47 (citing *United States v. Wharton*, 320 F.3d 526, 537-38 (5th Cir. 2003)). Mr. Fariz requests that this Court enter a trial plan that would require that the government first prove (1) the existence of a conspiracy, (2) his willful entrance into the charged conspiracy, (3) his intent that others would murder or maim others outside of the United States, and (4) that a conspirator committed an overt act in the United States in furtherance of the conspiracy, prior to presenting any argument or evidence of any murders themselves (if even necessary).

3. Counts 3, 4, 22-32, 33-43 – Material Support-Related Counts

Counts Three and Four allege that the Defendants conspired to provide material support and resources or funds, goods, and services to designated foreign terrorist organizations ("FTOs") and specially designated terrorists ("SDTs"), in violation of 18 U.S.C. § 2339B and 18 U.S.C. § 371, respectively. Counts 22 through 32 allege that the Defendants, as specified, provided material support in the form of money to the PIJ. Counts 33 to 43 allege that these same transactions constituted money laundering, in that the transfers were made with the intent to promote providing material support to an FTO or the contribution of funds to a SDT.

In order to prove a violation under the material support counts, the government will have to prove beyond a reasonable doubt that (1) the Defendant knowingly (2) conspired to provide or provided/made or received contributions (3) of material support or

resources/funds, goods, or services, (4) to a designated FTO/SDT, knowing that the group or individual was designated or knowing of the activities that caused it to be designated, (5) with the specific intent to further the unlawful activities of the FTO/SDT. 18 U.S.C. § 2339B; *see* Doc. 479, Order of Mar. 12, 2004, at 24, 26.

As argued above, Mr. Fariz contends that evidence of the attacks is not actually relevant to the charges in this case. Particularly with respect to the material support charges, admission of the attacks is irrelevant and unfairly prejudicial, especially since the designation statute precludes a defendant from challenging the factual validity of the PIJ's designation in trial as a defense to those counts relying on the FTO designation. 8 U.S.C. § 1189(a)(8). Since Mr. Fariz cannot challenge the validity of the designations, which describes the "status" of the organizations or individuals, the government should be foreclosed from introducing evidence of any alleged violent activities of the designated organization or individual. *Cf. Old Chief v. United States*, 519 U.S. 172 (1997) (holding that where defendant offers to stipulate to his status as a felon, the government should be foreclosed from introducing evidence concerning the names and nature of the prior felony conviction).

Second, the government has informed the defense that "the indictment does not allege, and the government need not prove, that money contributed by defendant Al-Arian directly went to fund a violent act charged in the indictment." (Letter of AUSA Terry Zitek to William B. Moffitt, Esquire, dated Oct. 25, 2004, at page 4) (Attached as Exhibit B). Mr. Fariz expects that the government will have the same position as to the other three Defendants before the Court. If such is the case, then the government should be foreclosed

from introducing any evidence of the attacks alleged in the indictment, unless and until the government has shown that material support or funds from these Defendants actually financed a violent act.

Should the Court determine that the attacks are relevant to the material support counts, then Mr. Fariz's order of proof request extends to these counts as well. In such a case, Mr. Fariz would request that the Court require the government to prove: (1) that he conspired to provide or provided (2) something that he knew constituted a "material support or resource" or "funds, goods, services," (3) to the PIJ (as an FTO or SDT) or to an individual who was an SDT, and (4) with the specific intent to further criminal activities (as opposed to charitable, humanitarian, or other lawful activities), prior to admitting evidence concerning the alleged attacks (if necessary).

4. Travel Act Counts

Counts Five through Twenty-One allege that the Defendants used facilities in interstate commerce with the intent to (a) commit a crime of violence to further extortion and money laundering, and (b) otherwise promote and carry on extortion and money laundering. As to the allegation contained in part (a) of these counts, the government should be required to come forward, outside the presence of the jury, with a sufficient showing that Mr. Fariz actually used the telephone *with the intent to commit a crime of violence.* None of the alleged Counts against Mr. Fariz, namely Counts 12-16 and 18-21, correspond to any overt acts that demonstrate any use of the phone on the part of Mr. Fariz with the intent to commit a crime of violence. The government should have to demonstrate some evidence of this

intent prior to introducing any evidence of attacks that the government may claim to be relevant to these counts.

C. Proposal for Hearing, Outside the Presence of the Jury, to Assess Whether the Government has Established These Elements

Should the Court accept this motion for a trial plan, Mr. Fariz would propose that a hearing be held, outside the presence of the jury, once the government believes that it has proven the elements that would establish that the four Defendants before the Court were members of the charged conspiracies, as more specifically set forth in Part II.B, *supra*. At that hearing, the parties would present argument as to whether the government has met its burden as to these elements. If the Court determines that the government has not met its burden as to these elements, then evidence of the attacks should not be admitted. Fed. R. Evid. 401-403.

If the Court determines that the government has met its burden as to any counts, that hearing would also be an appropriate time to address additional relevance, prejudice, and other evidentiary issues as to the government's proposed evidence concerning the attacks. This hearing would give the parties the opportunity to make arguments concerning the relevance and prejudice of specific items of evidence or anticipated testimony, and afford the Court the opportunity to assess the relevance and prejudice based on the proceedings to date. Mr. Fariz would therefore request leave of the Court to address such issues at this hearing.

III. Even if the Attacks are (or become) Relevant to the Charges in this Case, Mr. Fariz (A) Contends that Attacks Not Carried Out by the PIJ are Irrelevant, (B) Requests Preclusion of Certain Evidence Concerning the Attacks under Rules 401, 402, 403, and (C) Objects to the Introduction of Hearsay Evidence and Asserts his Confrontation Clause Rights

Should the Court determine that evidence of the attacks is relevant to the charges in this case, Mr. Fariz contends that attacks not carried out by PIJ members on behalf of the PIJ should not be admitted into evidence. Mr. Fariz also contends that certain testimony and evidence should not be introduced because it is irrelevant, Fed. R. Evid. 401, 402, because of unfair prejudice, confusion of the jury, and other considerations under Rule 403, and because it constitutes hearsay.[8]

To be admissible at trial, evidence must be relevant. The Federal Rules of Evidence define "relevant evidence" as:

> [E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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[8] As addressed in footnote 7, *supra*, Mr. Fariz has been unable to review all of the materials from Israel pertaining to the alleged attacks, because of the delayed disclosure of these materials. The vast majority of these materials are in Hebrew, with a much smaller portion in Arabic, and an even smaller fraction in English. The government has produced a very limited amount of materials that the government has translated into English.

Mr. Fariz anticipates, based on the government's previous representations in Court, as well as on the small portion of documents that they have translated into English, that much of the evidence concerning the attacks would be in the form of live testimony. Mr. Fariz therefore addresses those materials that he anticipates that the government may use, and would ask for leave of Court to address evidentiary issues as to evidence that the government may ultimately seek to introduce at trial.

Fed. R. Evid. 401. Relevance is based on the "relation between an item of evidence and a matter properly provable in the case." Fed. R. Evid. 401 advisory committee notes.

This Court may exercise its discretion to exclude even relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. As the Advisory Committee Notes to Rule 403 explain, "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, through not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's notes. The "availability of other means of proof may . . . be an appropriate factor" to consider when deciding whether to exclude on the grounds of unfair prejudice. Advisory Committee's Notes on Fed. R. Evid. 403.

While recent Eleventh Circuit cases characterize the Court's discretion under Rule 403 as "narrowly circumscribed," *see, e.g., United States v. Norton*, 867 F.2d 1354, 1361 (11th Cir. 1989), earlier Fifth Circuit precedent characterizes the Court's discretion as "broad." *See, e.g., United States v. Kerley*, 643 F.2d 299, 301 (5th Cir. Unit B 1981); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1347 (5th Cir. 1978). Where there is a conflict, the Court should be guided by the earlier precedent. *See, e.g., United States v. Hornaday*, 392 F.3d 1306, 1316 (11th Cir. 2004). Under either characterization, the Court's determination under Rule 403 is reviewed for an abuse of discretion. This standard reflects that this Court is vested with the authority to determine, with respect to the specific issues and considerations in this case, the probative value of any offered evidence or testimony as compared to its danger of unfair prejudice, confusion or misleading of the jury, considerations of waste of

time, and the needless presentation of cumulative evidence. Fed. R. Evid. 403. Because of the obvious prejudice of acts that the government has labeled as "terrorism," and the demonstrated prejudice of the potential jury pool against the Defendants generally (and Dr. Al-Arian specifically), Mr. Fariz requests that the Court consider these factors when assessing the unfair prejudice of the evidence offered.

A. Attacks Not Carried Out By the Palestinian Islamic Jihad are Irrelevant, Unfairly Prejudicial, and Risk Jury Confusion, and Therefore Should be Excluded

Mr. Fariz contends that no attacks should be admitted into evidence unless and until the government can establish that, at the time of the attack, the attack was committed by PIJ members for and on behalf of the PIJ enterprise or conspiracy. The government has alleged seventeen acts of violence alleged to have been committed by "conspirators associated with the PIJ." (Doc. 636). The government should not be able to introduce acts for which the government cannot prove: (1) that the individuals involved in the attack were members of the PIJ, and (2) that the individuals were authorized to commit these attacks as agents of the PIJ. Otherwise, the government will be shifting the burden to Mr. Fariz to disprove that an attack was committed by the PIJ, rather than the government being required to meet these elements.

Thus, even if the government ultimately establishes that the Defendants before the Court were members of the alleged conspiracies and the other elements of the charges, such that the government should be allowed to introduce evidence of the attacks themselves, Mr. Fariz requests a second order of proof. The next phase of inquiry should concern whether

or not the PIJ was responsible for an attack, prior to the government introducing evidence of (1) victims, including testimony by such individuals or any medical or forensic pathology evidence regarding such individuals, (2) mechanisms of the attack, including any forensic evidence concerning explosives, chemical analysis, or other devices, and (3) images of the alleged attacks.

B. Certain Evidence is Not Relevant and is Unfairly Prejudicial to the Issues Concerning the Defendants Before the Court

1. Testimony or Evidence of Forensic Pathology Reports, Medical Records, and Similar Evidence

As argued above, absent a showing that (a) the Defendants before the Court conspired to murder (as alleged in Counts One and Two), and (b) that an attack was done by PIJ members as agents of the PIJ, then testimony and evidence concerning victims of the attacks, including medical records and forensic pathology reports, would not be relevant. Fed. R. Evid. 401; Fed. R. Evid. 702. In addition, these materials (of what we have been able to review) do not address whether the PIJ was involved in an attack, and whether the Defendants in this case are liable as members of the Count One or Two conspiracies. Accordingly, such evidence should be excluded. Fed. R. Evid. 402.

Mr. Fariz also requests that the Court exclude these materials on the grounds of unfair prejudice. Fed. R. Evid. 403. The details contained within the autopsy reports, particularly photographic evidence contained within the reports, are especially graphic. Mr. Fariz is therefore particularly concerned that the jury, upon viewing such materials, will have an emotional or visceral reaction, and will subsequently be able to reach a decision in this case

based on a rational assessment of whether the government has met its burden of proving beyond a reasonable doubt that the Defendants are guilty of the charges in this case.[9] Rule 403 was designed for this exact purpose of avoiding emotional-decision making. Fed. R. Evid. 403 advisory committee notes. The danger of unfair prejudice substantially outweighs the remote (if not non-existent) probative value of these materials in this case. Fed. R. Evid. 403; *United States v. Roark*, 753 F.2d 991, 994 (11th Cir. 1985) (indicating that the "major function of Rule 403 is 'limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.'") (citation omitted). Mr. Fariz accordingly requests that these materials be excluded.

Should the Court determine that these materials are admissible or testimony concerning these issues is relevant and not unfairly prejudicial, Mr. Fariz would request that the Court exclude from admission into evidence any references or labels contained in these reports or medical records to "terrorist attacks." For example, the government has produced an English-language translation of medical records that indicate that an individual was stabbed during a "terrorist attack." Such a statement is hearsay without an exception. *See* Fed. R. Evid. 803(4) ("Statements made for purposes of medical diagnosis or treatment and describing . . . the inception or general character of the cause or external source thereof

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[9] Because of the sensitive nature of these materials, and the Protective Order governing them (Doc. 485), Mr. Fariz previously moved to file certain motions in limine under seal (Doc. 920). This Court granted the motion. (Doc. 925). Upon further consideration in light of the volume of materials, Mr. Fariz would request instead the opportunity to bring the contested materials to Court and display them only to the Court and the parties. This presentation will allow the Court to assess the prejudice of these materials at that time.

insofar *as reasonably pertinent to the diagnosis or treatment*.") (emphasis added). In this case, the method of attack may be pertinent for diagnosis or treatment (*e.g.*, stabbing), but not a person's characterization of an attack as "terrorism." It therefore should not be admitted. Fed. R. Evid. 403.

Finally, reports made with an eye toward future litigation or criminal prosecution, such as forensic pathology or autopsy reports, should not be admitted without the opportunity for confrontation. *See Crawford v. Washington,* 541 U.S. 36, 47 n.2 & 49 (2004). Accordingly, such reports should not be admissible if they will violate Mr. Fariz's Confrontation Clause rights.

2. Testimony or Evidence Concerning Explosives, Bomb Tech Reports, Chemical Analysis, and Similar Evidence

a. Testimony or Evidence from Israel Concerning the Alleged Attacks

Mr. Fariz raises similar arguments as to testimony or evidence concerning reports on the explosives, bombs, or other devices used in alleged attacks. As argued above, absent a showing that (a) the Defendants before the Court conspired to murder (as alleged in Counts One and Two), and (b) that an attack was done by PIJ members as agents of the PIJ, then testimony and evidence concerning the method of an attack, including bomb tech reports, chemical analysis, and other studies, would not be relevant. Fed. R. Evid. 401. Accordingly, such evidence should be excluded. Fed. R. Evid. 402.

Mr. Fariz also requests that the Court exclude these materials on the grounds of unfair prejudice. Fed. R. Evid. 403. Testimony or evidence concerning these reports will result in

a strong emotional reaction on the jury, rendering it unlikely that the jury will be able to reach a rational assessment of the Defendant's guilt or innocence. Rule 403 was designed for this exact purpose of avoiding emotional-decision making. Fed. R. Evid. 403 advisory committee notes. Because these materials have no, or extremely limited, probative value, their probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. Mr. Fariz accordingly requests that these materials be excluded.

Finally, reports made with an eye toward future litigation or criminal prosecution, such as bomb tech or other similar forensic reports, should not be admitted without the opportunity for confrontation. *See Crawford,* 541 U.S. at 47 n.2 & 49. Accordingly, such reports should not be admissible if they will violate Mr. Fariz's Confrontation Clause rights.

b. Testimony or Evidence Concerning the Government's Bomb Testing Conducted in the Everglades on November 17, 2004

On November 17, 2004, the government conducted explosive demonstrations, purporting to simulate bombings in some of the alleged attacks in this case. *See* Letter of government, dated Oct. 19, 2004, informing the defense of their intention to conduct "several explosions" (Attached as Exhibit C). During the testing, the government conducted three explosions, by their own terms, "not designed to serve as exact replications of the events in either Beit Lid or Kfar Darom, [but] [t]hey were based upon the devices which [Israeli National Police] forensic experts attributed to those scenes *to provide a demonstration of the destructive effects of such devices on their surroundings*." (Reports of Kirk Yeager and Mark Whitworth, dated Feb. 1, 2005, at page 2) (emphasis added). As to each of the

demonstrations, in a conclusion adding nothing to the knowledge of a layperson, the experts opine that, "The explosive force created by a charge of this type coupled with the fragmentation created by the nails and objects in the close proximity to the blast would be capable of causing property damage, personal injury or death." *Id.* at 4. The government has provided a report, several photographs, and video images (including real-time, slow motion replay, and freeze-frame images) of the bombings and of their after-effects.[10]

Mr. Fariz raises a number of challenges to the admission of any such evidence. First, unless the government can establish that the Defendants conspired to commit these particular attacks, they are irrelevant, Fed. R. Evid. 401, and should be excluded, Fed. R. Evid. 402. Since the government has not alleged that the Defendants planned or participated in any attacks, the government's simulated bombing is not relevant to any issues in the case. This proposed expert testimony and evidence is therefore not of the sort that would "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

Second, the simulated bombings should be excluded because of unfair prejudice. Fed. R. Evid. 403. As to two of the bombings, the government blew up local Hartline buses. In one of the bombings, a mannequin used in the experiment had on a t-shirt saying "John FBI Academy."[11] This demonstration would clearly lead to an emotional reaction by the jury,

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[10] Mr. Fariz has not attached a copy of this report to the motion, but would propose making it available for the Court to review at a hearing or at trial prior to its proposed admission.

[11] One minivan had a "Proud to be an American" or similar message on its rear window. This message does not, however, appear in the images captured from the simulations.

including the reaction of the jury potentially putting themselves in the shoes of those on the buses.

Mr. Fariz additionally objects to the admission of any slow-motion or freeze-frame images of these simulated bombings. They have no independent relevance to the issues in this case. Fed. R. Evid. 401, 402. In addition, to the viewer of such protracted images, the reaction is prolonged, heightening the unfair prejudice. Accordingly, such images should not be admitted. Fed. R. Evid. 403.

Finally, Mr. Fariz would object to the introduction of the simulated bombings as cumulative and unnecessary, particularly if the government is allowed to introduce other videos of actual attacks. Fed. R. Evid. 403; *cf.* Fed. R. Evid. 1004 (allowing for admission of duplicates if the original is lost, destroyed, or not available).

Should the Court determine that the simulated bombings are otherwise admissible, Mr. Fariz would request a hearing, outside the presence of the jury, where the government will have the burden to establish the foundation of the similarity between the simulated bombings in the Everglades and the actual bombings in the Middle East. *United States v. Gaskell*, 985 F.2d 1056, 1060 (11th Cir. 1993).

3. Photographs, Videos, and Other Images of Alleged Crime Scenes

The government has produced numerous photographs and several videos with images of alleged attacks. For the reasons stated in paragraphs 1 and 2, *supra*, these images are not relevant, Fed. R. Evid. 401, and therefore should be excluded, Fed. R. Evid. 402. Even if relevant, the extremely limited probative value of these images is substantially outweighed

by the danger of unfair prejudice. Fed. R. Evid. 403. More than any other aspect of the case, the images of alleged attackers and victims of the alleged attacks will serve to inflame the jury, rendering them unable to rationally assess the evidence in this case. Fed. R. Evid. 403 & advisory committee notes. Indeed, one video even contains what appears to be individuals at a memorial for the victims of the attack. Accordingly, Mr. Fariz requests that these materials be excluded.

C. Mr. Fariz Objects to the Introduction of Hearsay Evidence and Asserts his Confrontation Clause Rights

Pursuant to the Sixth Amendment's Confrontation Clause and Federal Rule of Evidence 801 to 804, Mr. Fariz objects to the admission of the following types of hearsay or out-of-court declarations:[12]

1. Convictions, Guilty Pleas, and Confessions of Alleged Co-Conspirators

The government has produced a number of documents from Israel of convictions, guilty pleas, and confessions of alleged co-conspirators in courts in Israel, including military courts. Mr. Fariz objects to the admission of these documents, or testimony of Israeli or U.S. law enforcement or other officials, concerning convictions, guilty pleas, and confessions. *United States v. Eason*, 920 F.2d 731, 734 (11th Cir. 1990) ("[T]he admission of guilty pleas or convictions of codefendants or coconspirators not subject to cross-examination is

[12] The government has not provided notice to the defense of whether it seeks to introduce foreign records of regularly conducted activity, pursuant to 18 U.S.C. § 3505. Mr. Fariz objects to the admission of any such records. *Id.* § 3505(b).

generally considered plain error.") (footnotes and citations omitted); *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir. 1985); Fed. R. Evid. 803(22) (providing that judgments of prior conviction shall not be excluded on the basis of hearsay, except for judgments "when offered by the Government in a criminal prosecution for purposes other than impeachment, *judgments against persons other than the accused*") (emphasis added).[13]

Mr. Fariz further objects to the admission of any guilty pleas, confessions, or convictions in Israeli courts, including Israeli military courts, where the defendants were not afforded the same protections provided to United States citizens in United States courts under the Bill of Rights. For example, Mr. Fariz objects to confessions that were procured through torture or other means of impermissible physical or psychological coercion, demonstrating that a confession was not voluntary. *See generally Roark*, 753 F.2d at 992-94. Mr. Fariz would also object to the admission of convictions obtained without due process of law.

Finally, Mr. Fariz objects to confessions and other statements to law enforcement on the basis of the Confrontation Clause, as recognized in *Crawford*. This argument is addressed more fully in Mr. Fariz's motion in limine concerning co-conspirator statements. (Doc. 980), which he incorporates herein by reference.

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[13] Since the judgment or conviction would not be admissible, Mr. Fariz contends that an indictment, which merely reflects charges against an individual, should also not be admissible. *See, e.g.,* Eleventh Circuit Pattern Jury Instruction (Criminal Cases), Basic Instructions 2.1 & 2.2 (2003) (instructing the jury that "[t]he indictment or formal charge against any Defendant is not evidence of guilt.").

2. Police Reports, Intelligence Materials, and Other Government or Law Enforcement Documents

The government has provided numerous law enforcement and government reports within the Israeli materials. Mr. Fariz objects to the admission into evidence of these reports, reflecting either personal observations, Fed. R. Evid. 803(8) (excluding reports concerning "matters observed by police officers and other law enforcement personnel"), or the observations of others, Fed. R. Evid. 805 (hearsay within hearsay); *United States v. Mackey*, 117 F.3d 24, 28-29 (1st Cir. 1997) (finding that statements contained within a police report were hearsay statements by a third person, or "hearsay within hearsay," and excludable). Mr. Fariz additionally objects on *Crawford* grounds. 541 U.S. at 52-53, 68.

3. Newspaper and Other Media Reports

The government has provided numerous newspaper articles and television news reports within the Israeli materials. Mr. Fariz objects to the admission of these reports as hearsay, without an exception. Fed. R. Evid. 801-803. Mr. Fariz further objects to any statements within these media reports based on his rights under the Confrontation Clause.

IV. Conclusion

Based on the foregoing, Mr. Fariz respectfully requests that this Court preclude argument and the admission of any evidence concerning any attacks. Should the Court determine that the attacks are generally relevant, Mr. Fariz alternatively requests an order of proof that requires the government to establish the elements concerning the culpability of the Defendants in the alleged conspiracies, prior to the admission of any evidence concerning the attacks. Finally, should the Court then determine that the attacks are admissible, Mr. Fariz requests that the Court preclude the introduction of certain attacks and evidence that is irrelevant, unfairly prejudicial, and hearsay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Alexis L. Collins, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ M. Allison Guagliardo
M. Allison Guagliardo
Assistant Federal Public Defender